



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
SUCCESSION CAUSE NO. 2726 'B' OF 2006
IN THE MATTER OF THE ESTATE OF MWANIKI GICHINA (DECEASED)
JUDGMENT

1. The Summons dated 9th November 2006 is premised on Section 76B of the Law of Succession Act, Cap 160, Laws of Kenya, and Rule 44(1)(2) of the Probate and Administration Rules. It seeks revocation of the grant made in Thika CMCSO No. 69 of 1984, on grounds that material facts were not disclosed by the petitioner and that the grant it was obtained fraudulently by the making of false statements.

2. The application is brought at the instance of Gichina Mwaniki. He swore an affidavit on 10th November 2006. He complains that he was not informed by the respondent administrator when he sought the grant, although, he, the applicant, was a beneficiary of the estate. He alleges that he only came to learn in 2005 that representation had been obtained, and the grant confirmed. He alleges that the administrator failed to give a full account of the estate including not giving the names of all the survivors of the deceased. He indicates that the deceased died in 1963, and was survived by ten children, being four daughters and six sons. He states that the estate ought to have been devolved to the six sons equally, as the daughters were all married.

3. He has attached several documents to his affidavit. There is copy of a green card, showing that the deceased had been registered on 10th October 1961 as proprietor of Fort Hall Loc. 16/Ndunyu Chege/486. The property was then transferred on 6th February 1985 to Johnson S Muigai Mwaniki as personal representative of Mwaniki Gichina (deceased). On 11th December 1985 the property was subdivided into four portions and transferred to Johnson S Muigai Mwaniki, George Mwangi Mwaniki, Geoffrey Mwangi Mwaniki and Joseph Maina Mwaniki in different proportions, there is also copy of a certificate of confirmation of grant dated 4th September 1985 where it is indicated that the estate of the deceased was devolved upon George Mwangi, Mwaniki, Johnson S Muigai Mwaniki, Mwangi Mwaniki and Maina Mwaniki in different proportions.

4. The lead affidavit in reply to the application was sworn by Johnson S Muigai, on 2nd July 2007. It is averred that the applicant was an elder brother of the deponent. It is alleged that the deceased had made an *inter vivos* gift to the applicant in 1961, by allowing him to be registered as proprietor of Fort Hall Loc. 16/Ndunyu Chege/287. The applicant did not buy it as at the time he was young and unemployed and the same was bought with money paid as dowry for his sisters. He states further that the applicant had also indicated that he was not interested in any other property, and so did their other brother, Kamau Mwaniki. He states that the parcels have been developed. He has attached copy of a green card showing that the applicant was the first registered proprietor of Fort Hall Loc. 16/Ndunyu Chege/287.

5. There are also affidavits by three of the daughters of the deceased, that is to say Rahab Kabura Kariuki,

Debora Njeri Kamau and Beth Wambui Kamau. All their affidavits were sworn on 5th November 2007, and it is stated in all of them that the deponents had no objection to the distribution ordered by the lower court on 4th September 1985.

6. In response, the applicant swore an affidavit on 16th November 2007. He asserts that he bought Fort Hall Loc. 16/Ndunyu Chege/287 from his own resources, adding that he did not hold the same in trust for anyone. He alleges that he was paying school fees for the respondents, and therefore it was no accurate for the respondents to claim that he was unemployed. He avers that no citations were issued to him to state whether he was ready to apply for letters or not, neither was he involved at the distribution of the estate. He asserts that he was unfairly left out.

7. The application was disposed of orally. The applicant and one of the respondents gave sworn testimonies.

8. The applicant's testimony largely echoed the averments made in his affidavits. He asserted that he was a farmer and used to burn charcoal, and it was from these endeavours that he was able to raise resources sufficient to acquire Fort Hall Loc. 16/Ndunyu Chege/287. He denied the suggestion that the said property was estate property that was registered in his name only because his father had already been registered as proprietor of Fort Hall Loc. 16/Ndunyu Chege/456, and therefore he could not registered as proprietor of another parcel of land. He said that he was entitled to a share in Fort Hall Loc. 16/Ndunyu Chege/456, and he should have been listed as a survivor of the deceased in those proceedings.

9. On his part, the respondent testified that the applicant did not pay his school fees, asserting that the property in question was acquired from proceeds of dowry. He continued to assert that Fort Hall Loc. 16/Ndunyu Chege/287 was property that the applicant held in trust for the estate, hence justifying his exclusion from the distribution of Fort Hall Loc. 16/Ndunyu Chege/456.

10. After the conclusion of the oral evidence, the parties were directed to file written submissions. Only the applicant filed written submissions. The said submissions did not raise any legal arguments, for they were confined to analyzing the facts..

11. The court file in Thika CM CSC No. 69 of 1984 was not made available, so I did not get the chance to peruse through the record of the proceedings that led up to the distribution of the estate. I am left to rely entirely on the documents made available to me by the parties. It is not disputed by the respondents that the applicant was not given a share of the property that was the subject of Thika CM CSC No. 69 of 1984. Although the applicant asserts that he was unaware of the proceedings, it is the respondents' case that they had notified him, but he said he was not interested in the property and urged them to go ahead without him. They produced copy of an affidavit filed in Thika CM CSC No. 69 of 1984 where the applicant was listed amongst the survivors of the deceased. However, they did not answer the allegation by the applicant that he was not privy to the petition and was not involved in the distribution for he did not even consent to the same.

12. The deceased herein died in 1961, long before the Law of Succession Act, Cap 160, Laws of Kenya, came into force. Consequently, distribution of the estate of the deceased was subject to Kikuyu customary law, by virtue of section 2(2) of the Law of Succession Act. However, the administration of the estate was to be subject to the Law of Succession Act, by virtue of section of 2(2) of the Act.

13. Section 2(2) of the Law of Succession Act, applied Part VII of the Act, which governs intestate succession, to the estate of a person dying before the Act came into force in 1961. The provisions of the Part VII are in mandatory terms when it comes to the disclosures that ought to be made at the time of petitioning for a grant of representation. They are equally in mandatory terms with respect to distribution. At confirmation of grant it is required by the provisions of the Act and the Probate and Administration Rules that survivors consent to the distribution.

14. I have carefully gone through the record before me, and I am not convinced that the applicant was disclosed at the point of petitioning for the grant as a survivor of the deceased. I am equally not persuaded

that he was adequately involved at the point the estate was being distributed. Therefore, there was no compliance with the mandatory provisions of the Act and the Rules. The applicant, being a son of the deceased, ought to have been involved in the whole process even if he was not entitled to a share in the property or he was uninterested in taking a share.

15. Applications for revocation of a grant are grounded on section 76 of the Act. Under that provision a grant is liable to revocation if it was obtained in a process that was defective or founded on fraud and concealment of matter. The material before me establishes that there were defects in the process for the applicant was not involved in the process of obtaining the grant. That would be adequate ground for revoking the grant.

16. However, the power given to the court in section 76, to revoke grants, is discretionary. The court may or may not revoke a grant where it is demonstrated that there were problems with the process of obtaining the grant or with the administration of the estate. Given the age of the matter, I am persuaded not to revoke the grant, but rather to direct that the applicant be listed as a beneficiary of the estate.

17. The applicant appears to be more concerned about the distribution of the estate rather than representation. It has not been proved to my satisfaction that the applicant held Fort Hall Loc. 16/Ndunyu Chege/287 in trust, or even that the same originally belonged to the deceased. It has also not been demonstrated that he was not entitled to a share in Fort Hall Loc. 16/Ndunyu Chege/456. He was not involved in the process of confirming the grant when Fort Hall Loc. 16/Ndunyu Chege/456 was distributed, so there was no opportunity for him to be heard on whether or not he was entitled to a share in the property.

18. In view of what I have said above, I am moved to make the following orders:-

- a. **That I shall not order revocation of the grant made in Thika CM CSC No. 69 of 1984, instead I shall set aside or vacate the orders made by the lower court confirming the said grant and cancel the certificate of confirmation of grant issued on 4th September 1985;**
- b. **That the administrators shall apply afresh, in Thika CM CSC No. 69 of 1984, for confirmation of the grant made therein in a process that shall include and involve the applicant;**
- c. **That the court seized of the matter shall determine the applicant's claim to a share in the estate in the confirmation proceedings; and**
- d. **That the applicant shall have costs of the application herein.**

DATED, SIGNED and DELIVERED at NAIROBI this 22ND DAY OF JULY, 2016.

W. MUSYOKA

JUDGE